No. 21,136

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY, a corporation, and MARK FLETCHER,

Appellants,

vs.

JOHN W. JARRETT and JUANITA F. JARRETT,

Appellees.

REPLY BRIEF OF APPELLANTS

Appeal from the United States District Court
District of Idaho, Southern Division

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APPELLANTS' REPLY BRIEF

Argument

No additional comments are necessary about the Statement of the Pleadings and Jurisdictional Facts, the Statement of the Case or Questions Presented or Specification of Errors which are contained in the opening brief of Appellants.

Some comments about certain representations of fact contained in the brief of Appellees should be made, and they will be made during the discussions of that brief. It might be observed here, however, that the often-repeated allegation that the speed of the train was 73 miles an hour at the time of the collision is incorrect. Reference to the portion of the speed tape in evidence, Exhibit 27, will reveal that at the time the mechanism was broken the speed was approximately 67 miles an hour, a speed reduction already having commenced. Also, the tape shows a speed reduction to approximately 70 mph some distance prior to the collision and that thereafter there was some slight fluxuation in speed but prior to the accident speed already had begun to reduce and had gone

below 70 miles an hour when the accident occurred, at which time the emergency brakes were applied. Such speed over crossings which have either flasher lights or stop signs in a residential area where the right of way of the Railroad Company, as revealed by the photographs in evidence, is substantially unobstructed and is over 50 feet wide, certainly cannot in this day and age be said to be negligent and excessive speed.

Train Speed Immaterial

Counsel for appellees starts off his brief stating there is no contention being made that trains must be prepared to stop at all times, then he continues for page after page to belabor the appellants for not causing the train to operate slower through Boise and over this crossing. What, then, would be the purpose in going slower? If the streets are slick, would running the train slower make any difference in the way a vehicle is operated? This points up the contention of appellants that speed of the train has nothing to do with this accident. The vehicle made no effort to stop, it did not stop, it was driven without stopping through a stop sign, the very traffic control device which was intended to prevent just such an accident at this location, and the speed of the train had nothing to do with the accident.

Appellees have never pointed out to the court how the speed of the train had any connection with the accident and how going slower would have kept Nelson from running the stop sign. For speed to be of any consequence, it must have been the proximate cause of the accident, yet all appellees have been able to come up with is that with high traffic conditions (as to which there is no evidence), accidents might be expected to occur. The question of speed where the same has no connection with

the accident was considered in the case of Richards v. Chicago, R.I. & Pac. Ry. Co., (Kans.) 139 P. 2nd 427, a wrongful death action over a young girl was a passenger in a car struck at a crossing where, until the right of way was reached, there were obstructions to view. One ground of asserted negligence was the speed of the train in violation of a city ordinance. The court said:

> "It is difficult to see how the speed of the train, considered by itself, could have any direct bearing upon the collision here involved. Certainly, the speed of the car in which the young people were riding and the speed of the train would have to be considered in their relation to each other. If either one of them, and one only, had been going much faster or much slower than it was the collision would not have occurred. So, the train might have been moving 60 or 70 miles per hour, violating the ordinance to a greater extent than it was, and been entirely past the intersection before the car reached it.... So, the speed of the train in excess of the ordinance is not sufficient to establish liability. In Vance v. Union Pac. Rd. Co., 133 Kan. 11, 298 P.764, it was held: 'To entitle one to damage caused by a railroad train running through a city at a higher speed than is prescribed by a city ordinance, he must show that the violation was the proximate cause of the injury and loss'." P. 430.

The court held the proximate cause of the accident to be the negligence of the driver and his passengers.

If there were an obstructed view at the crossing so that a motorist could not use the crossing safely if a train was being operated at a high speed, that would be a different story. Here, though, view is open and unobstructed, substantially, for the last 100 feet and if a motorist stops for the stop sign as he is required to do by Idaho law, then a train within his zone of danger is fully visible and can easily be seen, whether it is operated at 60 or 70 or more miles an hour. As a matter of fact, in this case when Nelson drove through the stop sign, the train was only around 600 feet away and there is no evidence which would

even hint that a moving train 600 feet away would not be fully visible to any motorist who stopped his vehicle around the stop sign. Appellant's Exhibit No. 22, taken about 125 feet south of the tracks, picturing the view a motorist would have if he stopped before reaching the traffic sign, shows that the train would be plainly visible. The crossing print, Exhibit No. 41, extends only a little more than 450 feet to the west, but the last telephone pole shown on it is the same pole pictured in Exhibit No. 22 with a wire running from it to the signal house on the right of way, just to the right of the third tree from the right and it is 390 feet west of the crossing. A train moving toward the crossing and passing behind these trees would be plainly visible even from 125 feet south. This being true, how could a slower moving train be of significance in preventing accidents at this location?

Slick Street Possible Proximate Cause

What possible influence could the slick streets have on the question of negligence on the part of appellants? The only effect such slick streets could have would be on the ability of a driver to stop, and if because of ice he could not stop whereas without the ice he could have, and this is the only relevancy which ice and snow have in this case, then it is the ice which is the cause of the accident and nothing else. Assume for a moment the unsupported contention of appellees actually has a factual basis - that Nelson tried to stop for the train and couldn't because his wheels were spinning and he couldn't move off the crossing.

> "Neither the speed of the train, the lack of signals or of a crossing watchman, or the failure to sound a whistle caused this collision, since the driver of the automobile saw the approaching train and did that which under ordinary driving conditions would have stopped the car. An intervening cause, the slippery pavement, caused the automobile to continue in its forward movement, and that slippery

condition of the pavement was the sole proximate cause of the accident and of the death of Dona Lee Hart."

Hart v. Wabash R. Co., 7th Cir., 1949, 177 F.2nd 492, 494.

As the Hart case says earlier, ". . the icy condition of the pavement was the sole proximate cause of the collision, and the plaintiff cannot recover even though there may have been negligence on the part of the defendant. (citing cases)." P. 494. The Hart case was for the wrongful death of a 17 year old girl riding in the back seat of an automobile where there was a clear view of the tracks 97 feet from the tracks, where the street was icy and slick and the train was moving in excess of 60 miles an hour through a town in Indiana. Judgment in favor of plaintiffs was reversed. The only factual points where the Hart case is not on all fours with our case is that it occurred in the daytime and the driver was not drunk. In our case, there is no evidence Nelson tried to stop for the train. But what the court has said relative to sliding on the ice will apply with equal effect to Nelson driving through the stop sign. If Nelson could not stop, or start, his vehicle because of the ice and snow, then the proximate cause of the accident would be his inability to drive properly under that circumstance. Certainly the operator of the train could not know what the condition of Roosevelt Street was until he reached it. Slick streets do not impose additional duties upon the operators of trains, as the cases cited in appellants' opening brief, Point 5, page 11, establish, but upon drivers.

As stated in a case where a driver could not stop his vehicle due to the slick conditions of the street, the 8th Circuit Court has said:

"Manifestly, the reason why he was unable to stop his tractor-trailer before colliding with the locomotive in the instant case was because the highway was not in a normal condition. It was covered with ice, and it

was this situation that was the proximate cause of the accident. (citing cases) Defendant was not responsible for the icy condition of the highway . . .

Levendosky v. Chicago, Milw. St. Paul & Pac. Ry. Co., 8th Cir., 223 F. 2nd 395, 402.

Appellees are Bound by Pleadings and Evidence

Scattered throughout the brief are indications that appellees are trying to tell this Court it is possible Nelson tried to stop or actually did stop, and that anyway, there is no stop sign for the railroad crossing. They have overlooked the allegations of their complaint. Appellees set out several acts of negligence charged against Nelson, and appellants admitted all of these. Therefore, there is no remaining issue in this case as to those facts, appellants having admitted them. Included from Paragraph VI (first) (C.T. 9) are:

"o. In Nelson failing to observe and heed the stop sign and remain stopped for the train at the crossing."

* * * * * * *

"s. In Nelson failing to observe the law relative to the speed and stopping, of his car at the crossing marked by a highway stop sign in his path of travel."

Admitted and now established are the following allegations of the complaint: That Nelson was operating his vehicle under the influence of intoxicating liquors; failed to stop to avoid the collision; drove at an excessive and unlawful speed at the crossing; failed to slow down and stop to avoid the collision; failed to keep his car under control on the slick streets; failed to heed the stop sign and stop for the train; failed to look for the train and to slow and stop to avoid the collision; failed to see and heed the presence of the train; failed to keep his vehicle under control; failed to stop for the stop sign at the railroad crossing; and failed to discharge his duty of care toward Miss Jarrett. These

things having been established as between appellees and appellants, appellees may not now question them. Wright v. Lincoln City Lines, Nebr. 71 N.W. 2d 182, 184,185.

Despite these established facts, appellees now try to say there is no proof Nelson did not stop (page 14 of their brief); that there is no stop sign for the railroad tracks at this location (pages 15 and 37 of their brief); that Nelson was in his fatal predicament due to negligence on the part of the railroad instead of because of his failure to stop, to look and see and to remain stopped until safe to proceed, as Idaho law requires and as they alleged in their complaint (pages 37 and 38 of their brief); they try to say Nelson could not see the train because of obstructions to view, or in other words that he was not negligent in failing to see the train and stop or not negligent in looking effectively (pages 13 to 15 of their brief). Appellees cannot have the facts both ways - they sued Nelson and obtained a judgment against him, which has become final. Appellees by their pleadings and by keeping Nelson in the case, have established the point appellants are making - that anything appellants did or did not do constituted only conditions, and the sole proximate, intervening cause of the accident was the negligence of Nelson. Appellees did not assert against Nelson that he failed to heed warning signals; they claimed and the proof fully established that the accident occurred because Nelson did not have his car under control. In this circumstance, what difference does it make what appellants did or did not do? Appellees complain that it could not be right to say the railroad has no responsibility for what happened here, yet their own pleading, the proof produced and the law all combine to establish that the proximate cause of the accident was the failure of Nelson to stop

for the stop sign.

Appellees suggest that motorists on Roosevelt who stop at the stop sign would be confused and might mistake automobiles on Alpine Street with approaching trains, but this is gratuitous on their part. There is no evidence that such possible confusion exists and on the other hand, their own witness, Wood, refutes the contention. He had no trouble seeing the train when it was around 1,300 feet away at Garden Street; he had no difficulty observing it was a train and observing its speed enough to determine that he could cross safely, but he stated that if the train had been any closer, he wouldn't have tried it - and Nelson was behind him. Wood was not confused by a train 1,300 feet away, yet when Nelson reached the crossing, the train was only 600 feet away and it could not have been confused with an automobile by anyone, drunk or sober. Had Nelson even paused at the stop sign to look, the train would have been at and over the crossing and the accident would not have occurred. So we come back to the inescapable conclusion that the cause of the accident was the failure of the intoxicated Nelson to stop at and for the stop sign.

Appellees would have this Court believe the railroad right of way between the north edge of Alpine Street and the tracks is "dangerously obstructed" (page 13 of their brief). The signal shack, they say, combined with "the electric wire poles and signal posts and weeds shown by the true perspective exhibits" makes this a dangerous and hazardous crossing. Appellees are the only ones who feel there is any problem. No other witness so testified, and reference to the photographs in evidence, even those taken by appellees' own attorney and which obviously were taken with a telephoto lens so that telephone poles appear to be all

bunched together, demonstrate the absurdity of such a statement. For the weeds which were there to have been a view obstruction, a person would have to be lying on the ground. The poles and posts are scattered and could not hide a moving train, and the signal shack would be a view obstruction only for the driver of a standing vehicle if the train also were standing still in one certain location, and then only if the vehicle were very close to the track and the train were a long distance away. Whatever it might mean that the signal house "was a constant blinder for the previous 10 feet at height of 9 feet", page 13 of the brief, it is obvious the poles and weeds and signal shack are no view obstruction to a driver of a moving vehicle at night approaching and passing the stop sign of a brightly lighted train 600 feet to the west. Exhibit 22 clearly demonstrates this, as well as Exhibits 21, 6 and 14, and appellees' witness, Wood, so testified.

The attempt to establish Leaper's testimony about the noise he heard as positively being that of screeching tires will not succeed, if it be remembered that he was not outside and all he testified to was that he heard a noise which sounded like tires screeching. The rest of the testimony of Mrs. VanEngelen and Wood and Mrs. Nichols and the train crew will establish that Leaper is wrong about screeching tires and that this noise really was the last imperative blast of the whistle from the train, commenced about when the train was passing the Nichols house and which Mrs. Nichols definitely heard and remembers. The distance fits well with what Fletcher, the engineer, said was the place where he first saw Nelson and saw he was not stopping for the stop sign. Leaper, in fact, positively testified he heard whistle signals <u>prior</u> to that time - and he was appellees' witness. The positive testimony of appellees'

witnesses is that whistle signals were given at a time when, if heeded by Nelson, the accident would have been prevented. In such a situation, Idaho holds there is no negligence in the sounding of signals, even if less than one-quarter of a mile. Ineas v. Union Pacific R. Co., 72 Idaho 390, 241 P. 2d 1178. We come back, again, to the sole proximate cause of the accident being the act of the intoxicated driver failing to stop for the stop sign. Even if we assume what counsel on pages 14 and 15 wishes the Court to think, that the screeching noise was caused when Nelson stopped and then speeded up, the only reasonable conclusion would be that Nelson was trying on icy streets to beat the train to the crossing!

Appellees seek to bring in evidence which was not admitted in the case. For instance, on page 8 in point 4 they say there was no stop sign and that this was "a busy urban stop street", although the evidence is there were no cars on Alpine Street and none approaching the crossing from the north and only three cars were shown to be going north on Roosevelt; on page 31 they say traffic "regularly used" the crossing; on page 33 they say Roosevelt is a "high traffic" street; on page 41 they say this is a "busy urban grade crossing"; yet all testimony as to traffic conditions other than at the time of the accident was correctly kept out of the case.

Crossing Not Extra-Ordinarily Hazardous

Appellees would have this court believe the view here is such that one could not use the crossing without danger. They are disturbed that the view from the stop sign is so good and have tried to disparage the panoramic photographs, have said the engineer couldn't see the stop sign from 600 feet away, whatever that has to do with the case, and have kept repeating over and over as if repeating it would make it true,

that from the stop sign to the tracks, a distance of about 100 feet, the view at the crossing is such that the crossing is dangerous and obstructed. Appellees' Exhibit No. 6 was taken around 600 feet from the street and was taken with an automobile stopped at the stop sign. This photograph shows that a driver when stopped can see the train if it were at the location of the camera, that prior to that point and just past it a driver would have as good or better view and that if the vehicle stopped at the intersection itself in relation to the stop sign on Alpine which can be seen clearly in the photograph, view toward the train would be entirely unobstructed and open. Appellees' own evidence is entirely along the line that a driver at the crossing can see a train for over 1/4 a mile, and that Mr. Wood actually did see this very train at such a distance and could at the time tell it was a train and that he had time to cross ahead of it.

The obstructions on the west as a motorist approaches the tracks are not such as to make the crossing extra-ordinarily hazardous to use. In fact, there is about 100 feet when vision to the west is almost totally unobstructed so that by the exercise of ordinary care a driver may use the crossing safely. Because of the stop sign, which requires motorists to stop at such place as would eliminate the effect any obstructions might have, appellants urge that the physical circumstances at the crossing had no effect whatsoever upon the accident and did not play any part. Nor did these circumstances impose upon appellants any other or different standard of care than usually applied at railroad crossings. The crossing was dangerous on the night of the accident because of two facts or conditions - there was ice on the street making it slick, and Nelson drove through the stop sign without stopping and without obeying the very

traffic control device which would have prevented the accident. Thus, it was his act, possibly coupled with the road conditions - for neither of which appellants can be charged - which caused the accident. Appellants could do nothing to prevent the collision when Nelson failed to stop at the sign where the engineer had every right to believe he would stop.

Negative Whistle Evidence Does Not Raise Issue

It is not just being in the area where whistle signals could be heard and not remembering them which creates an issue about whistles. That is purely negative testimony and as indicated by Ralph v. Union Pacific R. Co., 82 Idaho 240, 351 P. 2d 464, is not the type of testimony which will raise an issue. Rather, as was said in the old and mainly discredited Fleenor case quoted by appellees at great length, and on page 24 of their brief, it is only when witnesses are "looking and listening for the train and were in a position near the track where they could see and hear equally as well as other witnesses" that negative testimony will raise an issue. In this case, only the testimony of Wood could possibly raise such an issue, but he made a contrary statement at an earlier time, Exhibit No. 32, and at no time offered any explanation or justification for speaking out of both sides of his mouth. It was not his testimony that he listened for whistles and heard none, but only that he thinks if they were blown, he would have heard them. Yet, appellees' own witness, Leaper, testified both as to hearing whistles and to hearing, immediately after, a screeching sound or sounds. Wood said he did not hear such screeching, but we assume appellees would not want to say that this was evidence there was no such sound. Obviously, Wood's testimony is not sufficient to raise any issue about what was or was not

being sounded at the crossing. His attention was directed to other things, since he knew already about the presence of the train.

Superceding, Independent Negligence of Nelson Caused Accident

While appellees will admit, at the bottom of page 26, that Nelson was negligent, they say there is no evidence "he knew the train was coming until it was too late by virtue of the lack of control over his car" (emphasis added). This admission establishes the point we have been trying to make all along, that the accident was the result of Nelson failing to control his car instead of the result of any acts or omissions on the part of appellants. The controlling reason that Nelson failed to know about the train until too late was that he failed to obey the law and stop at the stop sign which he was required by law to do whether or not a train was coming. Had he stopped in compliance with law, he would have discovered the presence of the train.

Appellees refer at the top of page 27 to two cases which appellants did not cite but which tend to support their position. The Court is invited to look at one of these, Shelite v. Chicago, Rock Island and Pacific R. Co., 10th Cir., 307 F.2nd 49. It establishes that a passenger can be contributorily negligent by failing to look and to warn the driver, and where the evidence reasonably shows that the passenger failed to exercise such care, there is no cause of action. The facts here are that if Catherine Jarrett warned Nelson, he ignored the warning and failed to stop for either the train or the stop sign. The facts here are not consistent with her having warned Nelson but are consistent with the existence of contributory negligence on her part.

Appellees have tried at this late date to raise a presumption of due care on the part of Catherine Jarrett. However, the trial court

specifically did not give an instruction on the presumption and, indeed, it would have been against Idaho law so to do. Domingo v. Phillips, 87 Idaho 55, 390 P.2d 297; Mundy v. Johnson, 84 Idaho 438, 373 P. 2d 755. We will not discuss the matter any more because it is not an issue in this case, having neither been raised by the pleadings nor instructed on by the court nor raised as a point on appeal by appellants.

The lengthy references to Valles v. Union Pacific Ry Co., supra, and Miller v. Union Pacific Ry. Co., 290 U.S. 227, 54 S.Ct.172, 78 L.ed. 285 by appellees indicate they confuse the contentions being made by appellants relative to proximate cause with the separate and undisputed rule relating to joint or concurrent negligence. Appellants are raising no point that the acts of appellants and the negligence of Nelson cannot be joined in the action, but rather are contending that the admitted, established and gross negligence of Nelson was an independent, intervening proximate cause causing any acts or omissions of appellants to become merely conditions leading up to the fatal event. For that reason, there is no reason to distinguish Valles and Miller. The point we raise is illustrated by the case of Ranstrom v. Oregon Short Line R. Co., D.C. Idaho, 18 F. Supp. 256, where the action by a passenger was dismissed because the negligence of the occupants of the car was an intervening, independent cause.

In that connection, appellees referred to 52 Am. Jr., Sec. 112, page 452 to the effect that there can be joint liability for separate tortious acts, but the same section on page 453 says:

> "If the tort of each defendant is several when committed, it does not become joint because afterwards its consequences unite with the consequences of several other torts committed by other persons in producing losses. The rule of absence of joint tort liability has been regarded

> as particularly supportable where there is no concert of action or common intent, and the acts are separate as to time and place, but in some cases it has been regarded as applicable even though the torts of the persons involved were simultaneous and precisely similar in character."

Thus, the question here is whether a railroad company and the engineer of a brightly lighted train which is whistling and which can be clearly seen for the last 100 feet from a stop sign to the tracks are to be held joint tortfeasors for an accident which results when an approaching driver who is intoxicated runs the stop sign on slick and icy streets and drives in front of the train without making any effort to stop. Surely, there can be no doubt that when the driver ran the stop sign, any prior acts of negligence on the part of appellants, if any, had ceased to have causative effect and nothing they then could do would prevent the accident.

While appellants do not dispute the joint and concurrent tort rule and thus need not review the several cases cited by appellees on pages 28 through 39 on this point, we should note that the quotation set out on page 36 of appellees' brief from Olin v. Honstead, 60 Idaho 211, 91 P. 2d 380, is from the dissent. That was an action between a licensee and the landlord and the case actually holds that an earlier act of negligence was superceded and was not the proximate cause of the injury to plaintiff. This is the point being urged by appellants.

Appellees attack Hickert v. Wright, Kansas, 319 P.2nd 152 on the basis that Nelson's negligence here came just a little bit later than any alleged negligence of appellants, whereas in Hickert, it was some time later. Of course, the length of time between separate acts is not material, but rather it is whether the later event superceded the legal

effect of the earlier act, whether a second earlier or a year earlier. This is well demonstrated by the Hickert case. This was a wrongful death action for a 17 year old girl brought against both the driver of the car and the parties who negligently installed a tire which failed while the vehicle was being driven at speeds in excess of 90 miles an hour. In dismissing the action against the other parties but not as to the driver, the court pointed out that the act of the driver was an independent and efficient intervening cause and quoted from 38 Am. Jur., Negligence, sec. 68, pp 724, 725 in part as follows:

> "A person's negligence is not the proximate cause of an injury which results, not from the concurrence of his negligence, as an active and efficient cause, with another cause in producing the injury, but from the intervention of a new and independent cause, which is neither anticipated nor reasonably foreseeable by the person, is not a consequence of his negligence, is not controlled by him, operates independently of his negligence, and is the efficient cause of the injury in the sense that the injury would not occur in its absence. The intervention of the new, independent, and efficient cause severs whatever connection there may be between the person's negligence and the injury. ... An act which only furnishes the opportunity for the infliction of an injury is not the proximate cause of the injury, where the latter occurs as the direct result of some intervening force. Thus, where a negligent act creates a condition which is subsequently acted upon by another unforeseeable, independent, and distinct agency to produce the injury, the original act is the remote and not the proximate cause of the injury, even though the injury would not occur except for the act."

As the Hickert court noted, gross and wanton negligence is an independent and efficient intervening cause producing the injury and thus becomes the proximate cause, the original act of negligence becoming remote, for which no liability attaches. In our case, the illegal act of the intoxicated driver running the stop sign on the icy streets at a crossing where an earlier driver who did exercise care could easily see the approaching train, was an unforeseeable, entirely independent act which

appellants did not control and did not cause.

> "Defendant's negligence is too remote to constitute the proximate cause where an independent, illegal, willful, malicious, or criminal act of a third person which could not reasonably have been foreseen, and without which such injury would not have been sustained, intervenes."
>
> 65 C.J.S., Negligence, Sec. 111, pp. 699-700.

In the case of Shepard v. Thompson, 153 Kansas 68, 109 P.2nd 126, a judgment for the wrongful death of a passenger was reversed. There was no evidence that the passenger ever had given the driver any warning of the train which was in plain view while there was yet time to avoid the accident, and the court held that a guest or passenger in an automobile is under a duty to exercise reasonable care and precaution for his own safety and "he cannot recover damages if he fails to exercise such precaution and to give warning to the driver of an imminent danger". The court noted that there was no evidence the passenger did or did not give any warning, but because the train and the physical conditions could be seen as well by the passenger as by the driver, the court held the passenger had to be guilty of negligence on his own part. This is the same point we have been making in connection with Catherine Jarrett. Regardless of what appellees may speculate on about what went on inside the car, there is no question the stop sign was visible and well known to these two residents of the area, that they knew of the crossing, that the train could be easily seen from the vicinity of the stop sign and that the car failed to stop there and failed to approach the tracks so it could be stopped on the slick streets if a train were coming. Only two conclusions can be drawn concerning the actions of Catherine - either she warned Nelson and he failed to stop and use care, or she did not look, listen

or warn him. In either event, her own negligence bars her. Yearout v. Chicago, M.St.P. & P.R.Co., 82 Idaho 466, 354 P.2d 759, establishes that the contributory negligence of Catherine Jarrett is a defense to this action.

Controlling Fact in Case is the Stop Sign

The matters of speed of the train, presence or absence of whistle signals and what the view was prior to reaching the stop sign all became insignificant and of no legal effect when Nelson ran the stop sign and drove in front of the brightly lighted, plainly visible train which was, at that time, in hazardous proximity to the crossing. His actions were illegal, were negligence per se being in violation of several statutes set out in the appendix of appellants' opening brief and plainly were the independent, intervening proximate cause of the accident, as this court should rule as a matter of law.

A case having a great deal to say bearing upon the issue here presented is L.&N.R.Co. v. Fisher, (Ky.), 357 S.W.2nd 683. While it involved a daytime accident, much else is similar to our case. Tall weeds and vegetation were alleged to obstruct view until a motorist was at the stop sign at a railroad crossing. However, between the sign and the track upon which the train was approaching, trains could be seen readily. The Kentucky court found no negligence on the part of the railroad and instead treated the stop sign as being "of controlling significance", p. 686. There were no eye witnesses to the accident and no skid marks, just as in our case, and also some of plaintiffs' witnesses heard whistle signals. The court decided the case entirely upon the fact there was a stop sign which permitted the motorist to see if it were safe before trying to cross the tracks, holding that failure to exercise such care is

negligence as a matter of law.

> "In our opinion, no reasonably prudent motorist may justifiably ignore the warning of such a stop sign on a highway. To do so is to engage in a form of Russian roulette". P. 690.

If he did not obey the stop sign, the court said, it is negligence as a matter of law which constituted the sole proximate cause of the accident; if he did obey the stop sign, but continued "his subsequent conduct can only be explained as complete carelessness". See page 21 of appellants' opening brief for further quotation from this case. Since this is one of the few crossing cases involving stop signs, it should be very persuasive to this court. As the Kentucky court says, the existence of a stop sign is controlling.

Damages are Excessive

Unless there are no guide lines whatsoever and unless any verdict returned by a jury will be upheld, the verdict in this case is too high. There are no Idaho verdicts even near it and there is nothing in the record upon which to base such a large sum. The limiting phrase in the Idaho wrongful death statute which should permit this Court to look at the circumstances, is that jury awards shall be "just". Justice requires a balance of interests, and while the jury has the duty of fixing the amount of damages, nevertheless in Idaho that process is subject to review, and the precedents from this Court are that this Court will examine a verdict and reduce the amount where it is not just.

While prior verdicts are not controlling, they are indicative and an appellate court should not abdicate its proper function of supervision and close its eyes to anything a jury does, but should exercise its undoubted power to reach justice and reduce verdicts which are as

greatly excessive as the one in this case. Covey Gas & Oil Co. v. Checketts, 9th Cir., 187 F.2nd 561.

While Catherine Jarrett was shown by the evidence to be a very nice child, likely to be married soon and away from home as her older brothers and sisters, the only justification for the award here is "comfort, society and companionship". This is a pretty high price tag for those commodities, when never before in Idaho has there been such an award, when there is not even the element of lost "contributions which the parents might reasonably have expected to receive from the earnings of the deceased during his minority". Checketts v. Bowman, 70 Idaho 463, 220 P.2nd 682. If this requirement of the Idaho law of damages is observed, it is plain the award here is "too high".

Certainly, a jury may range far and wide in its determination of an award, but as appellees admit, there may not be any award for grief and anguish. Hepp v. Ader, supra. The value of the society, companionship and comfort of a 14 year old girl who will soon be away from home certainly, when viewed realistically and in the light of every day experience, isn't the hour by hour, day by day loss the advocates of the more adequate award urge for let us say, the loss of a husband and wage earner. Yet, this is the only justification for an award of this size here and when counsel for appellees says, as he does on page 56 of his brief, "That what Catherine's parents had missed about her was a daily experience. This will continue. The loss since her death has not diminished", what he is saying is that the parents grieve for their child and their grief is a day by day thing which has not diminished since the accident. We all know, from the experience of losing loved ones, that the loss of society and companionship and comfort tend to diminish. They may

never disappear, but they diminish, and to give an award of $60,000.00 for one of eight children to a family whose status is such that the award must very nearly exceed the annual net income of the father projected over his entire life expectancy, is shocking. Unless we are prepared to say there are no limits at all to a jury award for an untalented, ordinary 14 year old girl, similar to the limits for the loss of an adult husband and father wage-earner, this comparison should point up the extreme nature of the award.

What is this award but the punishment of a drunken driver? Yet, the Railroad Company which just happened to be there when this grossly negligent driver ran a stop sign in front of a train, is tarred with the same brush. Correcting this injustice and reversing as to the Railroad Company and Mr. Fletcher will leave intact the judgment of $60,000.00 against the person who caused it, since that part of the judgment is final.

To justify this grossly excessive Idaho award, counsel first states that awards in other jurisdictions are not of much help, and later says "making book" - whatever that means - on other awards from other jurisdictions can not accomplish much, but then cites several awards in other jurisdictions to compare with this one. Royal Crown v. Bell, 111 S.E. 2nd 734, is not a case which likely will appeal to most lawyers. It is a travesty. Blisard v. Vargo, 6th Cir., 286 F. 2nd 169, does not give any indication whether grief and anguish are permitted items of damage in Michigan, but Mann v. Bowman Transportation, Inc., 4th Cir., 300 F. 2nd 505 does so indicate. The words omitted by the three asterisks in the portion quoted on page 64 of appellees' brief are:

> "But who could say as a matter of law that this father experienced no grief, no sorrow, no wounded feelings, no mental shock and suffering... "

Sandifer Oil Co. Inc. v. Dew, 71 So. 2nd 752 involved the death of a terribly burned 14 year old girl who lived just under 100 hours in excruciating pain and the award here was based upon punitive damages. Even so, the dissenting judge felt the award far exceeded "rational total of compensatory and punitive damages". While no punitive damages officially are involved in our case, there is little question when comparing the award to others made in Idaho that the element of punishment looms large.

Mock v. Atlantic Coast Line R. Co., 87 S.E.2nd 830 involved an award allowing recovery for "mental shock and suffering, wounded feelings, grief and sorrow....", page 836. The reviewing judge felt the award to be "wholly disproportionate to the measurable damages sustained", but the court refused to set aside the award under South Carolina practice.

While appellees would like the court to believe that lower awards are representatives of an ancient and archaic age, the same is not true. See page 30 of appellants' opening brief. The various rules concerning damages for deaths of minors set out in the annotation referred to by appellees in 14 A.L.R. 2nd 550 are so varied and confusing relative to the permissible elements of damages as to be of no value whatsoever. However, reference to the decided cases will demonstrate the complete error in appellees' contention that remittiturs rarely are warranted. As in Idaho, the unusual or out-of-line awards such as this one generally are reduced and only in rare circumstances permitted to stand, usually where other factors exist. The cases referred to in the opening brief will indicate that modern cases are not calling for higher awards than older cases and that in this day as in any other day and age, courts

will reduce awards which are excessive and unwarranted.

Conclusion

So should it be done in this case. Appellants submit that under the evidence and the law, appellants were not shown to be negligent so as to be the proximate cause of the accident and judgment should be entered on their behalf upon reversal by this court; or, secondly, if that is not done, then there should be a new trial or at least a reduction in the amount of the excessive award.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing brief is in compliance with those rules.

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Service of the foregoing brief made by mailing three copies thereof to Bruce Bowler, 244 Sonna Building, Boise, Idaho, 83702, attorney for appellees, on February _____, 1967.

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